



RIGHTS STUFF

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Man Wins Sexual Orientation Discrimination Case

Luis Patino began working for Birken Manufacturing as a machinist in 1977. He said that beginning in 1992, he became the subject of name-calling on the shop floor. His co-workers called him derogatory slurs for gay men in English, Spanish and Italian, including "pato," "maricon," "pira," "faggot" and "homo." He said he heard such words at work often, sometimes two or three times a day. These comments devastated him and he felt overwhelmed by anger, frustration and humiliation. The demeaning treatment upset him so much his body would shake, his work production suffered and it became difficult for him to sleep.

For the first few years of this behavior, Patino decided he wanted to avoid confrontation. So instead of complaining to management, he recorded the abuse in his diaries. Eventually though, he did complain. In response, the owner of the company held a meeting and told the employees they had to stop using "bad words." Things got better for Patino, but only for a few weeks. When the verbal harassment began again, Patino complained again. Management transferred one offender, but that did not solve the problem.

In 1995, Patino hired an attorney, who wrote Birken and complained about the harassment. In turn, Birken's attorney wrote a response suggesting that Patino

see a psychologist because his job required him to work with precision instruments and he posed a safety risk if his mental facilities were compromised. The harassment went unabated.

Patino filed five complaints with a local human rights commission. One was settled after Birken agreed to hold a workplace harassment seminar. But few of the offending employees attended the seminar, and again, the harassment continued. His fifth complaint went to court. A jury awarded him \$94,500, and Birken appealed, unsuccessfully.

Birken argued that state law prohibited discrimination in the terms, conditions or privileges of employment, but that does not mean it prohibits a hostile work environment. The Court, after a long discussion of the meaning of the terms hostile work environment and work conditions, disagreed.

Birken argued that the derogatory terms were never said to Patino directly and that often they were spoken in languages Patino did not understand. The Court said that many of the comments were made directly to Patino and that even comments made behind an employee's back may be

(Continued on page 3)

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Man With Bipolar Disorder Wins \$56,000 in Disability Discrimination Lawsuit

Sean Reilly began working for the Cash Store in the summer of 2006 as an assistant manager. Shortly after he started his new job, he told his supervisor and HR that he had bipolar disorder. Later that year, he was promoted to store manager because of his good work. Not long after his promotion, he stopped taking the medications prescribed for his disorder.

In January of 2007, Reilly experienced manic behavior. He believed he was being followed and threw away his cell phone and other belongings. The police contacted his family, who picked him up, took him home and got him to start taking his medication again. The next day he called his manager, Dawn Rice, and told her he was too sick to work. Rice told him he would have to work anyway, despite his repeatedly telling her he could not. Then she told him he just had to work until she could get to the store.

When Rice got to the store, Reilly worked with her to update receipts. At about noon, his mother came and told Rice that Reilly had experienced a manic incident. She told Rice that it usually took a week or two to get his prescription right. Rice told Mrs. Reilly that her son could not take a week off, but she would try to find coverage for the next day.

A couple of days later, Reilly, not having been given any time off and still getting used to his new prescription, submitted a financial report that said the store's cash was \$90 short. The form for the report asked what could be done to prevent future deviations. Reilly wrote, "pray that the computers don't **** up again." He was written up and then terminated.

Reilly sued, alleging that he had a disability as that term is defined by law, that the Cash Store discriminated against him by denying him a reasonable accommodation (time off to adjust to the new medication) and then retaliated against him for requesting an accommodation by firing him.

The store gave various reasons for terminating Reilly's employment, including claiming he had altered computer control settings, wrote foul language on reports and had received verbal warnings but had not improved.

The Court decided Reilly did not have a disability because when he took his prescriptions, he had no significant limitations in daily life. Amendments to the Americans with Disabilities Act since this case went to trial would likely result in a different decision now. But the Court said that there was evidence that

the Cash Store regarded him as having a disability because of his bipolar condition, and that meant he could bring a lawsuit. There was sufficient evidence to go to trial over whether the store decided to terminate him because of his disorder. There was evidence that he, or rather his mother, had asked for a reasonable accommodation and that the store failed to engage in an interactive process with him to come up with an accommodation that met everyone's needs.

The Court of Appeals sent the case back to trial, where Reilly was awarded \$6,500 in back wages and \$50,000 for emotional pain and suffering. The case is Equal Employment Opportunity Commission and Reilly v. Cottonwood Financial Washington, LLC, 2010 WL 5300555 (E.D. Washington 2010).

A postscript: after being terminated, Reilly went back to college - he had dropped out because of his mental disorder. He graduated in 2010, summa cum laude, with a physical science degree, with concentrations in geology, environmental science and mathematics.

If you have any questions about your rights and responsibilities under the ADA, please contact the BHRC.



FedEx Settles Discrimination Complaints for \$3 Million

In March, the U.S. Department of Labor (DOL) announced that it had reached a \$3 million settlement with FedEx to resolve allegations that the delivery company discriminated against more than 21,000 job applicants at 24 facilities in 15 states.

According to the settlement, FedEx agreed to improve its hiring practices and to extend job offers to 1,703 people rejected for package handler jobs as those positions become available.

The alleged bias came to light not because anyone filed a complaint with the Equal Employment Opportunity Commission, but because of the DOL's regular audits

of companies the federal government does business with. The audit showed that 61% of the rejected applicants were female, 52% were African American, 14% were Hispanic, 2% were Asian and 1% were Native American. In Grove City, Ohio, 29.8% of the men who applied were hired, but only 18.7% of the women who applied were hired. More than 33% of the white applicants were hired, but only 21.9% of the African American applicants were hired. Only 18.7% of the Hispanics who applied were hired and only 15.7% of the Native Americans who applied were hired. The DOL said FedEx sometimes automatically rejected female applicants for jobs that required heavy lifting.

A FedEx spokesman, Patrick Fitzgerald, denied any wrongdoing, saying, "We agreed to the \$3 million to avoid what would have been a prolonged and much more costly resolution process."

Patricia A. Shiu from the DOL said, "This agreement will make a difference not just at the affected facilities but throughout the country so that this kind of hiring discrimination does not happen anymore."

(Article based on "FedEx to Pay \$3 Million in Bias Case," by Steven Greenhouse, New York Times, March 22, 2012, page B-1.)

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(Continued from page 1)

actionable if the employee is aware of them. Most of the comments were made in English and Spanish, both of which Patino speaks.

Birken argued that some of the words had more than one meaning and thus should not be held to be derogatory. For example, "pato" is a Spanish slur against gays but also means "male duck." The Court noted that the word "fag" has more than one meaning (it can mean a cigarette or a tuft of grass) but in context, it can be found to be a gay slur. And the Court noted that "there are presumably few occasions on which

employees would discuss male ducks on the shop floor."

Birken argued that since Patino sometimes chose to work on paid vacation days, his work environment must not have been all that hostile. The Court said that it could not find any authority "for the proposition that employees must take every opportunity offered to them to avoid their workplace in order to assert a hostile work environment claim" and that it "strongly disagrees that the plaintiff's claim is undercut by his strong work ethic or ability to withstand harassment on the job."

And finally, Birken argued that the damage award was excessive. The Court said Patino had testified in depth about the distress the harassment caused him. That, combined with the sustained nature of the harassment and the continued failure of Birken to remedy the situation, was sufficient to justify the financial award.

The case is Patino v. Birken Manufacturing, 2012 WL 1570857 (Supreme Court of Connecticut, 2012). If you have questions about fair employment laws, please contact the BHRC.



Requiring a High School Diploma May Sometimes Violate the ADA

Recently, a member of the public wrote the Equal Employment Opportunity Commission a letter, asking if requiring applicants to have a high school diploma would be a violation of the Americans with Disabilities Act. In a reply letter, Aaron Konopasky, an attorney advisor with the ADA/GINA policy division of the EEOC, said that in some cases, such a requirement could be a violation of the ADA. According to the EEOC, the "letter is intended to provide an informal discussion of the noted issue and does not constitute an official opinion of the Commission."

If the applicant could not obtain

a high school diploma because she has a learning disability, such a requirement could be a violation of the ADA. The employer, if sued, would have to show that requiring a diploma is job-related and consistent with business necessity. The employer would have to show that no reasonable accommodation exists that would make it possible for someone without a high school diploma to do the job.

Konopasky wrote in his letter that "Even if the diploma requirement is job related and consistent with business necessity, the employer may still have to determine whether a particular applicant whose learning dis-

ability prevents him from meeting it can perform the essential functions of the job, with or without a reasonable accommodation. It may do so, for example, by considering relevant work history and/or by allowing the applicant to demonstrate an ability to do the job's essential functions during the application process. If the individual can perform the job's essential functions, with or without a reasonable accommodation, despite the inability to meet the [diploma] standard, the employer may not use the high school diploma requirement to exclude the applicant. However, the employer is not required to prefer the applicant with a learning disability over other applicants who are better qualified."

City of Bloomington Seeks Nominees for the Latino Leader Awards

The City of Bloomington Commission on Hispanic and Latino Affairs is seeking nominees for the Latino Leader and Organization/Agency Awards.

The deadline for submission of nominations is July 27, 2012, and awards will be presented during the kickoff celebration for National Hispanic Heritage Month in September. Nomination forms are available in the City of Bloomington's Community and Family Resources Department (CFRD), Suite 260 in City Hall, 401 N. Morton St., and on-line at www.bloomington.in.gov/chla.

The Latino Leader and Agency/Organization awards recognize nominees who have made significant contributions to the Bloomington and/or Monroe County community.

Award Criteria: Through their contributions, nominees have been an influential role model, have advocated for

services and the rights of Latinos, and have shown continuous direct and effective involvement in the Latino community.

Nominations should include the name, address, telephone number and e-mail address of the nominee in addition to the reasons why the nominee merits the award. Those submitting nominations also should include their names, addresses, telephone numbers and e-mail addresses. Nomination forms can be completed on-line at www.bloomington.in.gov/chla, turned in at the CFRD office in City Hall or mailed to the Commission on Hispanic and Latino Affairs, Att: CFRD, 401 N. Morton St., Ste. 260, Bloomington, IN 47404.

For more information, please contact Melissa Britton, Latino Outreach Coordinator at 349.3860 or brittonm@bloomington.in.gov.